SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

NO. 127.

OGDEN CITY, APPELLANT,

vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO ET. AL.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

RESPONDENT'S BRIEF.

STATEMENT.

The original bill in this case was filed May 21, 1892, in the Fourth Judicial District Court of the late territory of Utah, against Ogden city, a municipal corporation, and its mayor and the members of its common council. (Rec. 7.) The relief sought therein was a perpetual injunction restraining the city and its officers

from levying assessments upon the real estate of the plaintiffs and of others similarly situated, for the purpose of paving a portion of Twenty-fifth street, known as paving district No. 2, in said city, and other relief. (Rec. 6.)

The bill alleges that the plaintiffs are residents and tax-payers in Ogden city, in Weber county, Utah territory, and bring the action concerning a matter of general interest to all tax-payers in said city, on behalf of plaintiffs, and of all others similarly situated; that the defendants, other than the defendant Ogden city, are the mayor and members of the common council of said city; that the said mayor and common council, acting in an organized capacity, did, on March 7, 1892, pass a so-called resolution or ordinance creating three paving districts in said city, numbered respectively 1, 2 and 3, district No. 2 (the only one embraced in the issues in this case) extending from the west line of Washington avenue to the west line of Wall avenue on Twenty-fifth street in said city; and that in pursuance of said so-called resolution or ordinance a notice of intention to create a district for paving and macadamizing Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue, to be known as district No. 2, and to defray the expense of such

improvement by local assessment, was published on March 9, 1892, by Ogden city. The said notice (which is set out *in haec verba* in the bill) prescribed the boundaries of Paving district No. 2, described the improvements proposed, gave the estimated cost of such improvements, and fixed the 29th day of March, 1892, as the day for hearing written objections to the assessments from any and all persons interested therein.

The bill then alleges that on March 29, 1892, at 9:55 o'clock a. m., sixty-nine owners of property within said paving district No. 2, and with a frontage on Twenty-fifth street, filed a petition with the city recorder of said city protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district, a copy of which protest is made a part of the bill and attached thereto as an exhibit; that four other owners of property in said paving district with a frontage on Twenty-fifth street, before action was taken upon the former petition, also filed a petition protesting against assessing their property for the purpose of paving said street; that the whole number of feet owned by the first sixty-nine protestors within said paving district, and with a frontage on Twenty-fifth street is about 2455,

being more than one-half of the whole frontage on said street within said district liable to assessment for local improvements; that notwithstanding said protests of said abutting property owners, and without giving any other and further notice, and without giving any such notice as is required by law for the hearing of complaints of property owners, the mayor and members of the common council of said city passed a so-called resolution or ordinance to the effect that the city council proceed as speedily as possible to pave said Twenty-fifth street in district No. 2, with Utah sandstone blocks, that the city engineer prepare the necessary specifications at once, and that the competition for said work be restricted to *bona fide* residents of Ogden city; and that on May 2, 1892, the city recorder was instructed by a so-called resolution, to advertise for bids for the paving of said street in said district, which he thereupon did, by publishing a notice which is copied in the bill.

The ownership of specific parcels of land in said paving district, and owned in severalty by the plaintiffs respectively is then alleged, with the allegation that said property would be subject to a tax for local improvements in common with the other abutting property in said district, and that the plaintiffs file their

bill on behalf of themselves and all other owners of real estate in said district.

It is then alleged that it is the intention of the defendants to let a contract for the paving of said Twenty-fifth street in said paving district, and to levy a special tax for paying the expense thereof, upon the property of plaintiffs described in the bill, and also upon the land of other abutting property owners which may be liable for assessment in said district; that to pay the expense of said improvement the common council of Ogden city have under advisement an ordinance which provides for the paying of said expenses, and which has passed its first reading, which ordinance is made a part of the bill, and a copy thereof attached thereto; that the defendants, (officers of said city) claim they have a right to enter into a contract for paving said Twenty-fifth street, and to levy a special tax upon abutting property liable to assessment in said district; and that they intend to and will, unless restrained by order of court, enter into such contract for paving and levy such assessment upon said abutting property, which assessment will become a lien upon the property of plaintiffs, and upon all the abutting property of Twenty-fifth street in said paving district No. 2, which contract and levy will

cast a cloud upon the title of all of said real estate; that the proposed action of the mayor and members of the common council is entirely without authority and beyond their jurisdiction; that the notice of intention to create the paving district does not conform to the statute in certain particulars enumerated in the bill; that before said notice of intention to pave was published, no plans or specifications had been prepared, no particular kind of pavement had been adopted, no estimate had been made by the city engineer or any other officer of said city, and that the statement in the notice was of a gross sum, without any reference to the actual or any estimate of the cost; that there are many different kinds of paving (enumerating them) varying in cost from one dollar to four dollars per square yard; that many other real estate owners in said district would have signed the protest against paving if they had not been informed by certain members of the common council of said city that a majority of the real estate owners in said district should determine the material to be used in paving therein; that the plaintiffs have no plain, speedy and adequate remedy at law, and that unless the court shall interfere by an order and decree restraining said defendants, the said defendants will levy a tax

upon the plaintiffs, and upon all of the property of other real estate owners similarly situated, which is illegal and void, and will cast a cloud upon all of said real estate, and that the defendants, unless restrained by order and decree of the court, will enter into a contract for the doing of the work above set out, which, if illegal and void, will engender a multiplicity of suits upon Ogden city and upon plaintiffs and all others similarly situated; and that great and irreparable injury will result to the plaintiffs and to all others similarly situated if said assessments are made and said contract for paving is entered into by the defendants. (Rec. 1-6.)

The foregoing is a fair summary of such portions of the bill as are essential to a proper consideration of the questions involved in this action. To this bill a demurrer was interposed, which was ordered sustained by the court below, and, the plaintiffs declining to amend the bill and electing to stand thereon, judgment was entered dismissing the bill, and for costs. From this judgment and order plaintiffs appealed to the Supreme Court of the territory, when both the judgment and order were reversed and the cause remanded to the court below.

Armstrong v. Ogden city, 9 Utah, 255.

Thereupon, on the 6th day of April, 1894, the defendants filed an answer to the bill denying the major portion thereof, and admitting certain allegations which it is unnecessary to specifically recount at this place. Suffice it to say that the answer denies substantially all of the equities of tne bill. (Rec. 10-15.)

Thereafter and on the 9th day of April, 1894, the plaintiffs filed a supplemental bill alleging the filing of the original bill, with a brief recapitulation of its contents and the prayer thereof, the filing of the demurrer thereto, the order made by the District Court sustaining the demurrer, the appeal to the Territorial Supreme Court from the order and judgment on the demurrer, and the reversal of said order and judgment by the latter court. The supplemental bill then alleges the names of a large number of owners of real property in said paving district No. 2, who have elected to come into the action as parties plaintiff, and the original plaintiffs ask that the additional persons so named therein may be made parties plaintiff. It is also alleged in said supplemental bill that the defendants, after the commencement of the action, to-wit: on March 22, 1893, passed the ordinance, a copy of which is attached to the original bill, which ordinance is alleged to be invalid, and that said defen-

dants, in pursuance of said invalid ordinance and invalid proceedings of the city, its officers and agents, were about to expose the real estate described in the original and supplemental bills to satisfy the illegal assessments attempted to be levied thereon, and threatened to continue to sell said real estate annually for ten years as each installment of said assessment became due; that the plaintiffs protested against the sale of their property and the creation of a cloud upon their respective titles, but that said city and its officers and agents insisted upon said sale, whereupon the plaintiffs and each and all of them were compelled by the defendants to pay certain amounts, stated in detail, in order to prevent a sale of their property and prevent a cloud upon their respective titles; and that certain real estate belonging to some of the plaintiffs was sold by the city to satisfy the illegal assessments. The prayer is substantially that of the original bill with the additional prayer that an account be taken of the amounts paid by plaintiffs under protest, that plaintiffs have judgment for the same, that the sales of real estate may be set aside and annulled, and for general relief. (Rec. 15-19.)

The answer to the supplemental bill denies specifically all of its allegations except it

is admitted that the ordinance in question was passed as alleged. It is then alleged affirmatively that the plaintiffs are estopped to complain as in the supplemental bill alleged, that the same does not state facts sufficient to constitute a supplemental complaint, that the cause of action set up and stated therein is barred by the statute of limitations, that there is a misjoinder of parties plaintiff, and that there is a misjoinder of causes of action. (Rec. 19-25.)

On these pleadings the case was tried, and on the 27th day of October, 1894, findings were signed, and judgment entered giving plaintiffs the relief prayed for in both the original and supplemental bills. (Rec. 184-9.)

The defendants moved for a new trial upon the two statutory grounds:

1. Insufficiency of the evidence to justify the decision and that the decision is against law.

2. Errors in law occurring at the trial and excepted to by the defendants. (Rec. 192.)

The motion for a new trial was denied and thereupon the defendants appealed to the Supreme Court of the territory from the judgment and from the order denying the motion for a new trial. (Rec. 194-195); and in that

court both the judgment and the order were affirmed. (Rec. 196-200.)

Armstrong v. Ogden city, 12 Utah, 477.

The defendant, Ogden city, has prosecuted an appeal to this court from the judgment of the Supreme Court of the territory of Utah.

In discussing *seriatum* the errors assigned by the appellant, such of the facts will be recited and discussed as are important to a proper understanding of the questions raised.

APPELLANT'S SPECIFICATION OF ERRORS.

The errors assigned by the appellant, as set forth in its brief (pp. 29-33) are nine in number, and will be discussed in the order in which they are recited in the brief as nearly as an intelligent discussion will permit.

I.

The effect of the decree in this case is:

a.—To perpetually enjoin the collection of a local assessment levied by the common council of Ogden city upon the property of appellees and others to defray the expense of paving.

b.—To adjudge said asssessment invalid.

c.—To remove the cloud upon the title of the real estate of appellees, created by said invalid assessment.

d.—To decree void sales of real estate belonging to some of the appellees pursuant to said assessment.

e.—To require the appellant to repay to some of the appellees such amounts respectively as were paid by them under protest. (Rec. 188-89).

It is first urged by consel for appellants that the case is not one of equitable cognizance for the reason that it is brought to restrain the collection of a tax levied by the common council of Ogden city, an inferior tribunal of special jurisdiction, and it not being alleged that it is necessary to restrain the collection thereof, in order to prevent a multiplicity of suits or irreparable injury, or the throwing of a cloud upon appellees' title; and it not appearing that the proceeding sought to be enjoined and annulled is valid upon its face, and that the alleged invalidity consists in matter to be established by extrinic evidence.

At the very outset we take issue with counsel for appellants in their reading of the record, and insist that the court was right in enjoining the collection of the tax in question and giving the other relief, because, it appears from the pleadings and proofs, that:

1.—The tax was illegal
2.—The enforcement of the tax would:
a.—Lead to a multiplicity of suits.
b.—Produce irreparable injury.
c.—Throw a cloud upon title.
3.—The illegality of the tax does not appear upon the face of the proceedings and therefore,
4.—Extrinsic evidence is necessary to establish the invalidity of the tax.

A.

The Special Assessment was Illegal, Because the City Council had no Jurisdiction to Levy It.

That the tax sought to be collected was illegal, sufficiently appears both from the allegations of the bill and from the evidence adduced. The proceedings were initiated and the tax attempted to be levied and collected under the provisions of chapter 41 of the Session Laws of 1890 of the late Territory of Utah, which act is printed as an appendix to appellant's brief. Section 1 of said act provides, among other things, that the city council

> "Shall have power to pave, repave or macadamize any street or alley, or part thereof in the city, and for that purpose to create suitable paving districts, which shall be consecutively numbered." * * *

The cost of paving, macadamizing or repaving of the streets and alleys within any paving district, except the intersection of streets and space opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the square feet or feet front or both so abutting upon such streets and alleys. The assessments of special taxes for paving purposes herein provided for, shall be made as follows:

The total costs of the improvement shall be levied at one time upon the property and become delinquent as herein provided:

One-tenth (1-10) of the total amount shall be delinquent in fifty days after such levy, one-tenth (1-10) in one year, one-tenth (1-10) in two years, one-tenth (1-10) in three years, one-tenth (1-10) in four years, one-tenth (1-10) in five years, one-tenth (1-10) in six years, one-tenth (1-10) in seven years, one-tenth (1-10) in eight years, and one-tenth (1-10) in nine years; each of said installments, except the first shall draw interest at the rate of seven per cent. per annum from the time of levy aforesaid, until the same shall become delinquent, and after the same shall become delinquent, interest at the rate of 10 per cent. per annum shall be paid thereon. Such taxes shall be collected and

enforced as in other cases of special taxes. ***

Section 5 of said act reads as follows:

"All special taxes to cover the cost of any public improvement herein authorized shall be levied and assessed on all blocks, lots, parts of blocks and lots, lands and real estate bounding, abutting or adjacent to such (improvements or within the districts created for the purpose of making such improvement, to the extent of the benefits to such) lots, parts of lots, lands and real estate by reason of such improvement such benefits to be equal and uniform. Such assessments may be according to the square foot or feet frontage, and may be prorated and scaled back from the line of such improvement and an allowance made for corner lots so that they shall not be assessed at full rate on both streets, according to such rules as the board of equalization shall consider fair and equitable; and all such assessment and finding of benefits shall not be subject to review in any legal or equitable action, except for fraud, gross injustice or mistake. Provided, That when any public improvement shall extend into or through any unsub-divided tract or parcel or parcels of land, said taxes shall be levied so as not to be charged against the real estate adjoining such improvement

for a greater depth than the average distance through the sub-divided real estate to be taxed for said purpose."

Section 9 thereof is in the following language:

"When any special tax is levied it shall be the duty of the city recorder to deliver to the city collector a certified copy of the ordinance levying such tax, and such collector shall without delay give at least five days notice in one or more newspapers having general circulation in said city, of the time when such tax will become delinquent."

Section 13 reads as follows:

"In all cases before the levy of any taxes for any improvements provided for in this act the city council shall give notice of intention to levy said taxes naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within such city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefitted by such improvements; the estimated cost of such improvements and designate the time set for such hearing. If at or before the time so fixed written objections to such improvements signed by the owners of one-half of the front feet abutting upon that portion of the

> street, lane, avenue or alley to be so improved be not filed with the recorder the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

Pursuant to the power conferred upon that body by Section 1 heretofore quoted, the city council of Ogden city passed a resolution creating three paving districts to be known as No.'s 1, 2 and 3. (Rec. 26), ordered a notice of intention to levy a tax for paving purposes in district No. 2, to be prepared, (Rec. 26), and, after its preparation, adopted the same, and ordered that it be published for a period of twenty days, (Rec. 26; finding 4, Rec. 184-185.) The original bill alleges, (Rec. 2), the answer thereto expressly admits (Rec. 11), and the trial court finds (Rec. 185), that the notice of intention to pave in district No. 2, and to defray the expense thereof by levying a local tax on abutting property owners, was published on the 9th day of March, 1892. In said notice of intention it is recited that the city council will, on March 29, 1892, at 10 o'clock a. m., hear objections in writing from any and all persons interested in said local assessment. (Rec. 185). These facts have an important bearing on the question of the legality of the tax thereafter levied by the council. Section

13, *supra*, provides that if at or before the time fixed in the notice of intention, written objections to such improvements (paving) signed by the owners of one-half of the front feet abutting upon that portion of the street to be improved *be not filed* with the recorder, *the council shall be deemed to have acquired jurisdiction to order the making of such improvements.* While the statute does not so declare in *totidem verbis*, yet the counter proposition is manifestly implied, that if written objections to the paving, signed by the owners of one-half or more of the front feet abutting upon the streets to be paved *be filed* with the recorder at or before the time fixed for hearing the objections, *then the council cannot acquire jurisdiction* to levy the local tax or proceed with the improvements. The power of the council to pave and to levy a local tax to defray the expense thereof, depends upon the assent (by failure to object) of the owners of more than one-half of the front feet abutting on the street or streets to be paved. The source of the power is in the tax-payers. If the required number object the power is not conferred. If they consent the council may proceed to levy the tax and to make the improvement. The fact of consent of the requisite number is jurisdictional; and that consent (or in the case at bar, a failure to

object) is a condition precedent to the exercise of the power.

2 Dillon Mun. Corp. Sec. 800 and cases cited.

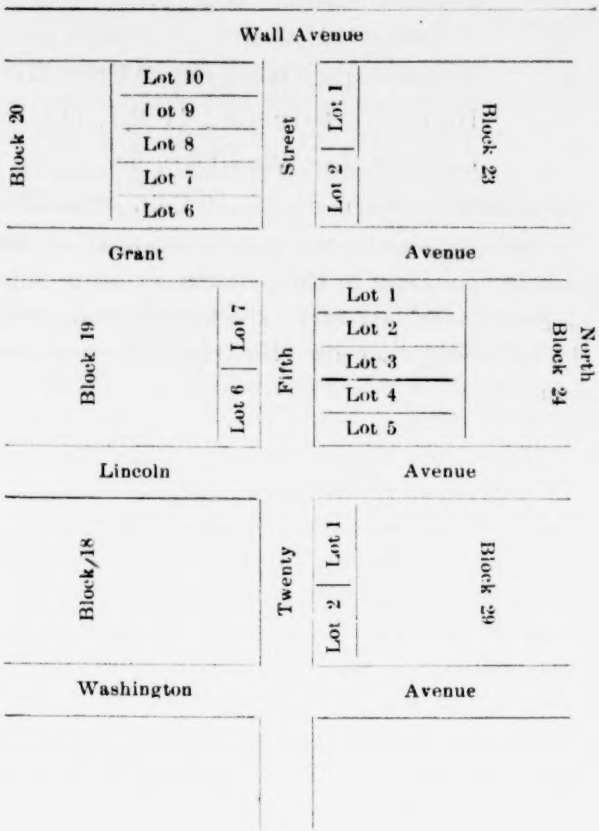
Armstrong v. Ogden city, 9 Utah, 255.

Holland v. Baltimore, 11 Md., 186.

Cooly on Tax, (2nd Ed)., 657.

Mulligan v. Smith, 59 Cal., 206, 229.

Paving district No. 2 as attempted to be created, consisted of three blocks on each side of Twenty-fifth street, or six blocks in all, and the following diagram illustrates their situation:


Wall Avenue
Block 20
Lot 10
Lot 9
Lot 8
Lot 7
Lot 6
Street
Lot 1
Lot 2
Block 23
Grant
Avenue
Block 19
Lot 7
Lot 6
Fifth
Lot 1
Lot 2
Lot 3
Lot 4
Lot 5
North
Block 24
Lincoln
Avenue
Block 18
Twenty
Lot 1
Lot 2
Block 29
Washington
Avenue

We are now insisting that the levying of this paving tax was illegal; and if we demonstrate that the owners of more than one-half of the front feet abutting upon the streets in said paving district objected to, and protested against, such paving, then it follows that the subsequent levy of the paving tax was illegal. For if the requisite number of such abutting owners, under section 13 aforesaid, objected to the improvement on or before March 29th, 1892, then the whole proceedings in levying and collecting the tax, and in selling property in enforcing it, were *coram non judice* and therefore null and void.

Dillon Mun. Corp. Sec. 800 and cases cited.

Holland v. Baltimore, 11 Md. 186.

State v. Elizabeth, 30 N. J. L. 176.

In re Sharp, 56 N. Y. 257.

People v. Brooklyn, 71 N. Y, 495.

Boyle v. Brooklyn, Id. 1.

Turrill v. Grattan, 52 Cal. 97.

The idea that underlies all levies of special assessments for local improvements upon contiguous property is that such property is specially benefitted thereby in the enhancement of its value, and section 13 of the statute was in-

tended to give abutting property owners the option of accepting or rejecting such benefits.

Cooley Taxation, 606.

Illinois Cent. R. R. Co. v City of Decatur, 147, U. S. 190.

It is not seriously contended, however, that the proceedings in levying and collecting the special assessment in the case at bar are valid, if the owners of more than one-half of the front feet of the contiguous property in said taxing district objected to said improvement. Did such a number of owners object to such improvement?

The sixth finding of fact of the trial court establishes that the total number of feet fronting on 25th street (the only street in the district) in said paving district was 3960; that the owners of more than one-half, to wit 2414 of said contiguous front feet, before 10 o'clock a. m. of March 29th, 1892, (the day designated in the notice of intention upon which to hear objections) filed a protest with the city recorder of Ogden city, protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said paving district; and that after 10 o'clock a. m. of said day the owners of 302½ front feet withdrew their protests, thereby leav-

ing at all times 2111¾ feet frontage still protesting against said local assessment. (Rec. 185.) According to this finding therefore, giving the appellant the benefit of withdrawals, *the majority protesting amounts to 263½*. This finding, as well as all others in the case, were sustained by the Supreme Court of the Territory of Utah, and a general judgment of affirmance was rendered by that court. (Rec. 196-200).

Armstrong v. Ogden city, 12 Utah, 477.

The Supreme Court of the territory, therefore, in effect, adopted the findings of fact of the District Court as its own for the purposes of an appeal to this court. Under the Act of Congress "Concerning the Practice in Territorial Courts and Appeals Therefrom" approved April 7th, 1874, the examination of this court is limited to the inquiry whether the decree can be sustained upon those findings, outside of questions of law arising upon the admission or rejection of evidence. This court cannot consider the weight of the evidence nor its sufficiency to support the findings. In other words, the findings of fact of the territorial District Court, adopted by the territorial Supreme Court, must be accepted as true by this Court.

Act of April 7, 1874, 18 Stat. at L. 27, Chap. 80.

Stringfellow v. Cain, 99 U. S. 610.

Cannon v. Pratt, 99 U. S. 619.

Mammoth mining Co. v. Salt Lake F. & M. Co. 151 U. S. 447.

Idaho and O. Land Imp. Co. v. Bradbury, 132 U. S. 509, 515.

We have already seen that the majority of front feet protesting according to the finding of the court, was 263½, but we call attention to another fact in this connection: the court also found that, of the total of 3960 front feet in the district, *785 feet thereof belonged to Ogden city and was used for public purposes by said city. (Rec. 185-6.)* The foregoing diagram shows that there are six blocks in the paving district, each with a frontage of 660 feet. This is an admitted fact in the case (Rec. 55). It is established by the aforesaid finding of fact, and is an admitted fact in the case, that the entire frontage of block 18, amounting to 660 feet in the paving district, was owned by the city and used for public purposes, and that 125 feet of the frontage in block 19 was owned by the city and used for public school purposes. (Rec. 55, 185; see also diagram, Rec. 142-3).

Should said 685 front feet which are owned

by the city, and used exclusively for public purposes, be considered as either objecting or consenting to the paving of the streets in this paving district? We insist not. The city claimed the right to count this public property in *favor of paving;* but the Supreme Court of the territory answered this contention most conclusively in the following language:

> "The total frontage of the district was 3960 feet. The lowest number protesting, after deducting withdrawals, as claimed by appellant, was 1878½ feet. But included in the 3960 feet were 660 feet owned by the city and used for city hall purposes, which the city council claimed the right to count in favor of the improving (improvement?), notwithstanding it was excluded in the paving ordinance from the property upon which the paving tax was levied, and notwithstanding the entire estimated expense of $40,000 for the improvement was levied upon the remaining 3300 feet, by assessing $12.00 against each of these last named front feet. If appellant's position were right, the statute permitting property owners in local assessment districts to vote against any proposed improvement would become entirely inoperative, at all events, so far as property owners living in close promoxity to public property is (are?) concerned. If, for instance the city council should create

> a paving district out of the four portions of streets that surround a square used exclusively for city purposes, it would only be necessary to secure the consent of the owner of a single front foot of the property abutting upon the opposite side of the street from the public square to abstain from protesting, and the remaining frontage would not only be powerless to prevent the improvement, but would be compelled to pay practically the entire expenses."
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> 12 Utah, 493-4.
>
> Rec. 199.

Therefore, excluding this 785 feet from consideration, as we are bound to do, there remained a frontage of 3175 feet in the district. Deduct therefrom the total number of feet protesting according to the finding of the court ($2111\frac{3}{4}$), and the result is that a majority of $1048\frac{1}{2}$ front feet in the district *subject to the special assessment* protested against paving in the district. The court also found that *after 10 o'clock a. m. of March 29th, 1892*, certain persons who had protested, to the amount of $302\frac{1}{4}$ front feet, withdrew their protests (Rec. 185), and said $302\frac{1}{4}$ front feet were deducted before the balance of $2111\frac{3}{4}$ front feet protesting was arrived at. But should an owner of front feet who had protested *before* the expiration or the

time for filing protests, be permitted *after* the expiration of such time, to withdraw his protest, and thereby have his property counted in favor of paving? Again we say not. These withdrawals were attempted to be counted by the city in the territorial District and Supreme Courts as in favor of paving, it being insisted that thereby the city council acquired jurisdiction to proceed with the improvement. But the following language of the Supreme Court upon that question is a complete answer to such contention:

> "But appellants contend that, even if the decision of the city council was not conclusive, it was a correct finding of fact. They admit that at the time appointed more than one-half of the front feet abutting upon the street had objected, but contend that the owners of a sufficient number of front feet withdrew their protest, and that, therefore, the city council acquired jurisdiction to proceed with the improvement. The statute above referred to sufficiently answers this contention. It expressly denies to the city council jurisdiction to proceed with the improvements, if, at the time fixed to hear objections, a sufficient remonstrance is presented. At that time such a remonstrance was presented. The city council was thereby wholly deprived of power to proceed.

> No power could be subsequently acquired in that proceeding. A new proceeding might be instituted, and after due notice of intention, new power could be obtained The parties protesting and not withdrawing acquired a right to rely upon the statute existing at the time appointed to hear objections, and were entitled to notice of any action affecting their interests. It may also be that others who desired to object refrained from so doing upon ascertaining that a sufficient protest was already filed. Jersey city Brewing Co. v. Jersey city, 42 N. J. Law, 575; Vanderbeck v. Jersey city, 44 N. J. Law, 626. Supposing that, at the time appointed to hear objections, less than one-half of the frontage abutting on the street had protested, would it then have been seriously contended that thereafter, and before the city council acted upon the protest, enough more protests could have been filed to defeat the improvements? If that could not have been done, clearly, the reverse could not be done, either." (Rec. 198.)

In support of the conclusion reached in the foregoing excerpt from its opinion, the court cites the cases of *Jersey City Brewery Co., v. Jersey city, 42 N. J. Law, 575*, and *Vanderbeck v. Jersey city, 44 N. J. Law, 626*. In both of these cases this identical question was consid-

ered, and decided against the position taken by appellant.

Therefore, counting such $302\frac{1}{4}$ feet against the paving, because of having protested in writing against such improvement, augments the majority protesting against paving to the number of $1350\frac{3}{4}$ contiguous front feet. But either including in, or excluding from, the ranks of the objectors, the public property of 785 front feet, and the withdrawals of $302\frac{1}{4}$ front feet, the result still remains, according to the finding of the trial court, which is conclusive in this court, that before the time designated in the notice of intention, written objections to paving in this district signed by the owners of more than one-half of the front feet abutting upon the streets to be paved in said district, were filed with the city recorder of the city. It follows, therefore, that we have established our first proposition, that the council failed to acquire jurisdiction to levy the special assessment, and that its subsequent attempt to levy and collect the same was *coram non judice* and therefore null and void. But counsel for appellant in this connection make the point that the city council acquired jurisdiction to make the improvement by the publication of the notice of intention as required by section 13 of the statute *supra* and that being a tri-

bunal of special and original jurisdiction, that body had exclusive jurisdiction to decide the question of fact whether or not a majority had protested against the improvement; and that its decision on such question of fact that a sufficient number had not protested is final and conclusive as against what is termed a collateral attack in a court of equity to set aside the assessment and enjoin its collection.

That such a contention is erroneous can be readily demonstrated. In the first place *the council did not acquire jurisdiction to pave by publishing its notice of intention to do so* as required by section 13 *supra*. If protests, sufficient in number, be not filed at or before the time designated for the filing thereof in the notice of intention, then, *and not till then*, shall the council "be deemed to have acquired jurisdiction to order the making of such improvement." Jurisdiction does not attach when the notice of intention is published, but when the owners of at least one-half of the contiguous front feet consent to the improvement by failing to object thereto. As Dillon on Mun. Corp. says:

> "When the power to pave depends upon the assent or petition of a given number or proportion of the proprietors to be affected, *this fact is jurisdictional*, etc."
>
> Section 800, Fourth Ed

The notice of intention is in effect simply a notice that the city intends to pave, *if the tax-payers consent*, that it will make a certain improvement, *if the requisite number of owners of contiguous front feet will confer jurisdiction.* When the notice is published there is no jurisdiction, and the city council cannot determine that it will or will not have jurisdiction *until the expiration of the statutory period of publication*, —twenty days. A given number of the owners of contiguous property in this paving district could at their option either withhold or confer jurisdiction. If the requisite number protested on the *20th day* of the publication of the notice, and thereby withheld jurisdiction from the council, how can it be said that that body had jurisdiction on the *first* day of publication. If the source of the power to pave is in the tax-payers and not in the council, how can the council acquire jurisdiction to pave until the tax-payers have conferred that power by a failure to object to its exercise? If the power is vested in the tax-payers, how can any other body or tribunal exercise that power until the tax-payers have transferred it? And they unquestionably do not relinquish it, or consent to its exercise by the council, until the notice of intention is published the statutory period of time; and at no earlier moment

than that can it be ascertained whether consent has been given or not. In the second place *this action is not a collateral attack* upon the finding made by the city council that the proprietors of a majority of the abutting front feet consented to the paving by failing to object thereto. It is a *direct* attempt to impeach the proceedings of the council in this matter. The legality of their proceedings is directly challenged by specific allegations in the bill; and the appellant answered such allegations, thereby presenting issues upon which the case was tried. The principal ground relied upon to set aside the proceedings was lack of jurisdiction; and, as we shall fully show hereafter, jurisdiction appeared upon the face of the record. It follows therefore that the contention of appellants counsel, that *certiorari* was the proper remedy is erroneous. Jurisdiction appearing on the face of the record, the remedy by *certiorari* was unavailable. What then could the complaining tax payers do but resort to a court of equity and directly challenge the legality of the tax? The statute authorizing the levy of special assessments makes no provision for an appeal to any other tribunal from any judgment or decision of the city council. There being no remedy either by *certiorari* or appeal, what could the tax-

payers do except to seek relief in a court of equity? The contention of appellant's counsel that a proceeding in equity to set aside the tax is a collateral attack is equivalent to saying that the decision and finding of the city council is final and conclusive against any attack whatever, and that that tribunal is a court both of first and last resort with supreme power to finally determine all questions arising in levying and collecting a local assessment, even the question of its own jurisdiction. If the municipal council of this city have such trancendant authority, then confiscation of the property of the citizen is within the range of possibilities. But that this is a direct attack on the judgment and finding of the city council is certain.

> "A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. A motion for a new trial * * * * bills in equity or complaints and petitions under the codes to set aside, vacate, modify or correct judgments * * * * *are direct attacks.*"
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> Van Fleet Coll. Att. Sec. 2.

It is conceded that the city council, while not in the strict sense of the term, a court, in finding that a given number of tax-payers did

not protest against paving, is exercising judicial functions, and the finding is in one sense a judgment. And any proceeding (such as this is) instituted for the express purpose of setting aside and annulling a judgment and of enjoining its execution is a direct and not a collateral attack on that judgment.

Hurlbut v. Thomas, 55 Conn. 181.

Penrose v. McKinzie, 116 Ind. 35.

Morrill v. Morrill, 20 Or., 96.

S. C. 25 Pac. Rep. 362, 364.

Dady v. Brown, 76 Iowa, 328.

S. C. 41 N. W. Rep. 209.

McNeil v. Edie, 24 Kan., 108.

Gage v. Busse, 114 Ill., 589.

It is not sought in this case to have a court of equity sit as a court of review for the correction of errors or irregularities, for the judgment of the city council is not attempted to be impeached for mere errors or irregularities. The judgment and proceedings of the council is attacked upon the ground that there was a total want of jurisdiction over the subject matter. Another reason why the decision of the city council cannot be included in the category of judgments proper, is that such decision is entered *exparte*. The tax-payers were

not parties to the proceedings in levying the tax in the sense that they had a right to be, or were, heard. The owners of an actual majority of the abutting front feet in this paving district, protested in writing against the paving; but the city council erroneously determined, after making an *exparte* investigation, that such a majority had not protested. The statute makes no provision for a hearing to which the abutting owners are made parties, or at which they are entitled to be heard. Neither is there any provision authorizing a motion for a new trial, an appeal, a writ of error, or any other procedure to cure defects, or correct errors or irregularities, or to have the whole proceedings vacated as being absolutely void for having been entered and carried on by a tribunal totally without jurisdiction. The judgment, if such it may be called, was entered without pleadings, without evidence, and without parties, and without any hearing having been had. Under such circumstances it is a misnomer to call the decision of the council a judgment, and the record of such a decision is certainly not protected from a direct attack in a court of equity upon the ground that it is void as having been made and entered by a tribunal without jurisdiction of the subject matter.

In the third place, counsel urge that the

finding of the city council that the owners of a majority of the frontage did not object to the paving is conclusive, and cannot be attacked and disputed in an action to set aside the assessment and enjoin its collection. It must be remembered that there is no provision of the statute which confers upon the council the power to finally adjudicate this question of fact. Section 13 *supra* of the statute simply says that if a given number do not file objections, the council shall acquire jurisdiction, but the statute is silent as to what tribunal shall determine whether such a number has protested. That question is a question of fact in this case, and we insist that the appellees were not precluded from showing the falsity of the record of the council on that question, which at most is only *prima facie* evidence of the facts recited therein. We are referred to no authority which decides that a tribunal of special and inferior jurisdiction can resolve that a truth is a falsehood to make it so. On the contrary the authorities do establish the doctrine, founded upon common sense and sound legal principles, tnat the finding of the city authorities that the requisite number had assented or petitioned, can be controverted either in defense to an action to collect the assessment, or in an equitable action to enjoin

the collection thereof, or even when the question arises in a purely collateral way; as when an action of ejectment is brought founded upon a title acquired by a purchaser at a tax sale to satisfy an illegal assessment, the owner may show in his defense that the requisite majority did not consent, notwithstanding the finding of the city authorities to the contrary.

Cooley on Taxation, 657 and cases cited.

Dillon Mun. Corp., Sec. 800 and cases cited.

Sharp v. Spier, 4 Hill, 76.

Henderson v. Baltimore, 8 Md., 352.

People v. Batchellor, 53 N. Y., 128.

Holland v. Baltimore, 11 Md., 186.

Carron v. Martin, 26 N. J. L., 594.

Mulligan v. Smith, 59 Cal., 206.

In the case of *Zeigler v. Hopkins, 117 U. S., 683*, there was but a single question presented for the consideration of the court, and that was whether, in an action of ejectment brought to recover the possession of lands sold for the non-payment of taxes levied to defray the expenses of opening a street in San Francisco, the land owner was estopped from showing, by way of defense, that the petition for the open-

ing presented to the mayor was not signed by the owners of the requisite amount of frontage. By a unanimous court it was held that the land owner was not so estopped; and in passing on the question the court cited and approved the case of *Mulligan v. Smith, supra*, saying expressly that that case is supported by both reason and authority.

B.

Not only is the tax an illegal one, but its enforcement would engender a multiplicity of suits.

That this tax is an illegal one, there is not a doubt; but we concede that that fact will not of itself furnish any ground for equitable interposition. In addition to the illegality of the tax proceedings, a complaining tax-payer must show that his case comes under some acknowledged head of equity jurisdiction. We submit that both the pleadings and proofs of the appellees (plaintiffs in the court below) show that this case comes under several acknowledged heads of equity jurisdiction.

First, it is alleged in the bill that plaintiffs have no plain, speedy and adequate remedy at law, and that unless the court interfere by an order and decree restraining the defendants, they will levy a tax upon plaintiffs, and upon all the property of other real

estate owners similarly situated, and will enter into a contract for putting down the paving, which will engender a *multiplicity of suits upon Ogden city and upon the plaintiffs and all others similarly situated* (Rec. 6); and the court makes a finding of fact that plaintiffs are without any speedy and adequate remedy at law for the recovery of the amounts paid under protest *without a great multiplicity of suits*, etc. (Rec. 187).

Under the authority of *Stringfellow v. Cain*, *supra*, and other authorities cited, which construe the Act of Congress "Concerning the Practice in Territorial Courts and Appeals Therefrom," this finding of the territorial District and Supreme Courts must be accepted as one of the admitted facts in the case in this court. But, in any event, the facts clearly justify such a conclusion. In the first place the original plaintiffs were seven in number, and filed their bill, as alleged, concerning a matter of general interest to all tax-payers in Ogden city, on their own behalf and on behalf of all others similarly situated. Subsequently, by a supplemental bill, *twenty-six* additional persons were made parties plaintiff. (Rec. 15-18). It appears also that *twenty-nine* different proprietors of contiguous property in this paving district paid their respective amounts

assessed against their respective properties, under protest (Rec 18-19; Finding 14, 187), which amounts were adjudged by the court to be repaid. (Rec. 189). Again, *sixty-eight* of the abutting property owners in this district protested against the levying of any local assessment for paving purposes in this district. (Rec. 185). And, finally, the evidence discloses that there were at the time of the attempted levy of this local assessment, no less than *ninety-eight* owners of property abutting upon the streets in the paving district in question. (See plats pp. 142-3 Rec). All but a very few of this number were owners in severalty. Therefore if the court had refused equitable relief by injunction, and had also refused the other equitable relief granted, and dismissed the bill upon the ground that the remedy at law was complete, what would have been the result? Ninety-eight (or nearly so) separate and distinct actions at law by as many different tax-payers, each seeking separately the same relief, or rather a portion thereof, which has in effect been given to their entire number in this single action. Ninety-eight separate controversies, each involving identical questions of law and fact with all the others, ninety-eight successive trials and ninety-eight separate judgments would seem to signify a

multiplicity of suits. Each individual property owner and tax-payer, if compelled to sue at law, could pay his tax under protest and bring an action to recover the amount back, or bring an action for damages against the officer enforcing the municipal collection, or permit his property to be sold for non-payment of the tax and then bring an action of ejectment agains the purchaser at the sale, or, he could retain possession and resist an action of ejectment brought by the purchaser; or he would possibly have some other legal remedy. And an equitable action to quiet the title could probably be maintained. But in no one of such actions could all the parties interested in the controversy be joined as plaintiffs or defendants, and thereby effect a settlement of the rights of all parties in one action. The record in this case furnishes a patent illustration of the concise statement of Judge Cooley in his work on taxation (2nd Ed.) at page 761.

> "There are cases also in which equity on a single record might dispose of controversies which at law would require a multiplicity of suits; and this fact may furnish ample ground for equitable jurisdiction; for both the public and the parties concerned are interested in avoiding unnecessary litigation."

Another significant fact which we call especial attention to is that the special assessment in question, by the express terms of the ordinance purporting to levy it, is payable in ten different installments, the first payable fifty days, and the last nine years, after the passage of the ordinance.

The effect of such a provision in the ordinance, if equitable relief, setting aside the entire assessment and enjoining its collection, were denied, is obviously apparent. Ninety-eight separate actions at law in some form, each year for a period of ten years! Under such a state of facts, argument would seem unnecessary, for the facts are their own argument, to show that any remedy furnished in a purely legal tribunal would be entirely inadequate, and that the equitable jurisdiction attached in this case for the purpose alone of preventing a multiplicity of suits. In addition to the authorities hereafter more fully considered, we refer here to the persuasive language of a leading text-writer emphatically upholding the exercise of equitable jurisdiction in cases such as the one at bar.

1 Pom. Eq. Jur. Sec. 260. 269, 270.

C.

The enforcement of this illegal tax would produce irreparable injury to the appellees and all others similarly situated.

The settled doctrine of courts of equity, crystallized from innumerable decisions is, that equity will enjoin the collection of an illegal tax, when, in addition to the illegality, it is shown that the injury resulting from its enforcement would be irreparable. The bill in this case contains such averments as bring this case clearly within that doctrine. It is alleged that great and irreparable injury will result to the plaintiffs, and to all others similarly situated, if said assessments are made and the contract for paving entered into by the defendants (Rec. 6), and facts in detail are alleged in both the original and supplemental bills clearly justifying such allegation. The facts found by the court clearly show that if the collection of this illegal tax were enforced, great and irreparable injury would result to the appellees. Among the facts so found are, that appellees are without any speedy and adequate remedy at law; that the assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of land; that

the appellant asserts that it will annually for nine years after the date of the findings, levy assessments upon said real estate for the payment of said paving, and collect the same from the appellees; that appellant has already caused to be sold the property of certain of the appellees under and by virtue of said assessment; that the lots affected by said assessment, and described in the ordinance levying it, vary in depth from a minium of 75 feet to a maximum of 150 feet, and that the property of appellees vary greatly in depth; that no ascertainment of actual benefits to the property assessed was ever made in order to determine the amount of assessment or to determine whether the amount assessed exceeded the actual benefits to the property by reason of the improvement, but the cost of the improvement was assessed upon the abutting property at an arbitrary rate of $12.00 per front foot without any finding, or attempt to find, the amount of actual benefits to the property (as required by section 9 of the statute *supra*); that the actual benefits to the property assessed for said improvement were not equal and uniform, nor was the assessment equal and uniform; that abutting owners in sufficient number protested, but, notwithstanding such protest, the ordinance levying the tax

was passed, and a contract for the paving entered into (Rec. 186-89). It is then found as a conclusion of law that the entire proceedings were void as having been taken without jurisdiction. Such a showing is certainly overwhelmingly sufficient to justify equitable relief by the preventive remedy of injunction, on the ground of irreparable injury.

> "By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury; all that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable by damages at law; and by the term 'the inadequacy of the remedy by damages' is meant that the damages obtainable at law are not such a compensation as will, in effect, though not *in specie*, place the parties in the position in which they formerly stood. * * * * The fact that the amount of damage cannot be accurately ascertained may aonstitute irreparable damage. * * * It is no objection to the exercise of the jurisdiction by injunction that a man may have a legal remedy. The question in all cases is whether the remedy at law is, under the circumstances, complete."
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> W. U. Tel. Co. v. Rogers, 42 N. J. Eq., 311, 314, quoting from Kerr on Inj. 200.

In the cases of *Newell v. Sass, 31 N. E. Rep., 176, 180*, the Supreme Court of Illinois thus defines the scope of the term "irreparable injury:"

> "Irreparable injury' as used in the law of injunctions does not necessarily mean that the jury is beyond the possibility of compensation in damages, nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one."
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> Citing Elliot, Roads & S., 497.

The facts in the case at bar show that the injury to the appellees and their property by casting unnecessary and repeated clouds on the title of said property from year to year for nine years, thereby compelling a multiplicity of suits to remove the same, or for other relief, at great expense, is a wrong of a repeated and continuing character, and the damages which may result therefrom cannot be measured or estimated by by any certain pecuniary standard. Under such circumstances, equity will enjoin the contemplated proceedings upon the ground that the resulting injury would be irreparable; for

in an action to recover damages for any of the resulting injuries to appellees in this case, the jury would be compelled, from the inherent nature of the wrongs, to estimate the damages by conjecture and not by any accurate standard.

Wilson v. Mineral Point, 39 Wis. 164.

Com. v. Pittsburg R. Co., 24 Pa. St. 160.

The word "irreparable" in the sense that it is used by courts of equity to express the rule that an injunction will issue to prevent wrongs of a repeated and continuing character, is not to be interpreted in its literal sense as defined by lexicographers. In legal parlance it has no such an expanded meaning, but is used as synonymous with "material" or "grievous."

Kerr on Inj. 199.

Sanderlin v. Baxter, 76 Va. 299.

S. C. 44 Am. Rep. 165, 168.

W. U. Tel. Co. v. Rogers, 42 N. J. Eq. 314.

It is apparent that the injury to the appellees, and to each of them separately, would be both a material, grievous, and, therefore an irreparable, one, if this illegal assessment were enforced each year for nine years, as threat-

ened, and that therefore the Supreme Court of the territory was right upon that ground alone, in affirming the judgment of the trial court, which enjoined the collection. As hereafter shown, also, this tax is a lien, or rather an apparent lien upon the land of appellees and of each of them, and constitutes an apparent cloud on each of their respective titles. This apparent cloud unquestionably diminishes the market value of the land and threatens a possible loss of it to the owners. It constitutes an apparent encumbrance upon it, and therefore an apparent defect in the title; and no strictly legal remedy could furnish adequate compensation for the injury occasioned thereby. No argument is necessary to show that such an injury is irreparable in the sense that equity will prevent it by injunction.

D.

The enforcement of this illegal tax would throw an apparent cloud upon the title of the land of each of the appellees which equity will intervene to prevent.

The statute under which this special assessment was levied, or attempted to be levied, makes the same, and each annual installment thereof, a lien upon the land of each of the ap-

pellees in the paving district. Such lien constitutes a cloud upon each of their titles, but if the tax itself is illegal and the levy thereof fatally defective, the cloud is an apparent, rather than a real and valid, one. The illegality of the tax, however, does not appear upon the face of the record, thereby requiring evidence *dehors* the record to establish its illegality. The record makes out a *prima facie* right in the taxing authorities to levy the assessment and collect it, and a *prima facie* right in one who should become a purchaser of the property of any of the appellees at a tax sale to satisfy the assessment. That is, the record shows that the city council acquired jurisdiction to levy and collect the assessment, thereby compelling a resort to evidence *aliunde* to overcome the *prima facie* showing of the record, and prove a total want of jurisdiction. We recognize the rule that no cloud upon a title justifies the interference of a court of equity, where the proceedings, which it is alleged create such a cloud, are void upon their face. This rule is stated by Cooley on Taxation, as follows:

> "If the tax is a lien upon lands, it may then constitute a cloud upon the title; and one branch of equity jurisdiction is the removal of appar-

> ant clouds upon the title, which may diminish the market value of the land, and threaten a possible loss of it to the owner. A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality; if, upon the face of the proceedings, it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once appraised of the illegality, the tax, it would seem, could neither constitute an incumbrance, nor an apparent defect of title; and, therefore, in law, could constitute no cloud. If this be so, the jurisdiction which is exercised by courts of equity, to relieve parties by removing clouds upon their titles, *could not* attach in such a case." (p. 779.)

But the distinguished author states the contrary doctrine with equal clearness and precision:

> "When, however, the illegality or fatal defect *does not* appear on the face of the record, but must be shown by evidence *aliunde*, so that the record would make out a *prima facie* right in

> one who should become purchaser, and the evidence to rebut this case may possibly be lost, or be unavailable from death of witnesses or other cause, or when the deed given on a sale of the lands for the tax would, by statute, be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon that for a recovery of the lands until the illegalities were shown, the courts of equity regard the case as coming within their ordinary jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent. The case son this point are numerous, and in considerable variety, as would be anticipated in view of the different tax systems under which they have been made" (p. 780.)

This court has twice recently announced substantially the same rule as that expressed in the extract last quoted.

> Gage v. Kaufman, 133 U. S., 471.
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> Union Pac. R. Co. v. Cheyenne, 113 U. S., 517.

In fact it is the universal rule estabiished by an unbroken line of authorities in all of the American courts. It is upon this principle of the law that we rely. The city council made a finding that the owners of a necessary majority

of the abutting front feet had not protested. A special committee of the city council, appointed for the purpose of ascertaining if a majority had protested, made a written report to the council that a majority had not protested, but on the contrary, that there was an actual majority of front feet of $202\frac{1}{2}$ (or 202.66?) in favor of paving. (Rec. 27-8, 143). This report was accepted by the council (Rec. 28) April 4, 1892, and on April 11, 1892, a resolution was passed by the council to proceed as speedily as possible to pave in this district (Rec. 28; finding 7, Rec. 186); and thereafter bids were advertised for and other proceedings taken looking to the completion of the pavement. (Rec. 186 et seq.) The notice of intention to pave, which was published, was held to be sufficient on its face by the Supreme Court of the territory on the first appeal in this case.

Armstrong v. Ogden city, 9 Utah, 255.

According to the face of the record therefore, the council had jurisdiction to proceed to levy the assessment and pave, but *in fact*, the council had no jurisdiction to proceed, because of certain facts which existed outside of the record, and which established that the recital of the record as to the truth of the fundamen-

tal jurisdictional fact, was in fact untrue; and to emphasize our position in this respect, the record disclosed that as many as twenty-three witnesses testified in the trial court on behalf of appellees, whose testimony was directed chiefly to proving that a sufficient number of owners of abutting front feet had protested against paving, and that therefore the council never acquired jurisdiction to proceed. (Rec. 34-112.) The trial court found as a fact that the assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and a conclusion of law is also made and signed to the same effect. (Rec. 187-188). Such findings being binding upon this court, and constituting admitted facts in the case, certainly furnish a sufficient basis for the conclusion that a court of equity will enjoin the collection of this assessment in order to prevent a cloud upon the title of appellees' realty.

E.

The invalidity of the tax does not appear upon the face of the record, and therefore extrinsic evidence is necessary to establish the invalidity thereof; in which case the remedy at law is inadequate, and a resort to equity is absolutely necessary.

The proposition just stated, intermingling both law and fact, is admitted by counsel for appellant, but it is urged that if the record does not show the invalidity of the tax, that fact must be clearly alleged in the bill. It is claimed that no such allegation is made, either in the original or supplemental bill in this case, and that the absence of such an allegation is fatal. While such an allegation is not made as a separate and independent allegation in so many words, yet it appears from the whole bill, and exhibits attached thereto as a part thereof, that extrinsic evidence is necessary to establish the invalidity of the tax.

First, the original bill alleges that the owners of more than one-half of the front feet on Twenty-fifth street within said paving district, protested against the levying of any local assessment against or upon their property for the purpose of paving the said street in

said district; and second, it is alleged therein that to pay the expense of said improvement the common council have under advisement an ordinance which provides for the paying of said expenses, and which has passed its first reading, which ordinance is attached to and made a part of the bill, and marked exhibit "B." [Rec. 2, 3 and 4]. In the preamble to said ordinance is this provision:

> *"And whereas in said paving district No. 2, there has not been filed written objections to the improvement mentioned, signed by the owners of one-half the front feet on said Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue." (Rec. 9.)*

Here we have an allegation in the bill that a sufficient number of contiguous proprietors *did* protest, and another allegation therein that the common council found that a sufficient number *did not* protest. It is first alleged as an actual fact, independent of the record of the council, that a sufficient number protested against the improvement, and it is then alleged in effect that the records of the council show that a sufficient number did not protest; for the ordinance is made a part of the bill, and it contains a finding by the council that a sufficient number did not protest. The bill first

alleges what the fact is, and then alleges that the council made a finding directly repugnant to the actual fact. Furthermore, the supplemental bill alleges (Rec. 18), that on the 22nd day of March, 1893, the council passed the ordinance attached to the original bill, and the answer to the supplemental bill expressly admits the passage thereof. (Rec. 22.) It is therefore an *admitted fact upon the face of the pleadings* that the council actually found that the necessary jurisdictional fact existed, and that such a finding was made a matter of record; and it is, in addition thereto, alleged in the bill that that finding is positively untrue. Such allegations are unquestionably the equivalent of an allegation that evidence *dehors* the record must be resorted to in order to impeach it.

Again it is alleged that:

> "The mayor and common council of Ogden City claim and pretend that they have the right and authority to enter into a contract for the paving of said Twenty-fifth street in said district No. 2, and to levy a special tax upon the abutting property liable for assessment in said paving district No. 2, etc." (Rec. 5.)

This means, of course, that, relying upon the finding of the council in favor of its juris-

diction, that body proposes to exercise such jurisdiction, notwithstanding the actual fact which exists *dehors* the record, and can be established by extrinsic testimony, that that body has no jurisdiction whatever. It affirmatively and conclusively appears from the face of the bill that *certiorari* would not be an available remedy because of the fact that the records of the common council show a finding of that body in favor of its own jurisdiction. How could such a finding be overcome except by extrinsic evidence? It is unquestionably averred in the bill that a sufficient number of contiguous proprietors actually protested; and it is also unquestionably averred therein that the common council made a finding that such a number *did not protest*. The implication necessarily results that a resort must be had to extrinsic evidence in order to overcome the *prima facie* showing of the record of the council. Unequivocal averments in a pleading will support implications which necessarily result therefrom.

Reynolds v. Hosmer, 45 Cal., 616.

Ogden State Bank v. Barker, 12 Utah, 13.

Enright v. Grant, 5 Utah, 334.

And if it is claimed that the bill is uncertain because it does not allege *in totidem verbis* the necessity of a resort to evidence *aliunde* the record in order to establish want of jurisdiction in the common council, our reply is that such an objection must be raised by a special demurrer, under the code of civil procedure of Utah, pointing out in what particulars the bill is alleged to be uncertain.

2 Com. Laws Utah Sec. 3221, 3222.

Owen v. Oviatt, 4 Utah, 95.

DeMortin v. Albert, 68 Cal., 277.

Yolo County, v. Sacramento, 36 Cal., 193.

A fact that must not be forgotten in this connection is that no objection was made to the introduction of any evidence in the court below upon the ground that the bill failed to allege the necessity of a resort to extrinsic evidence in order to establish a lack of jurisdiction in the common council to levy the assessment. Four days were consumed in the trial of the case at *nisi prius*, and during that time twenty-seven witnesses were examined, and a large amount of documentary evidence was introduced, almost exclusively for the purpose of showing that a sufficient number of

owners of abutting property had protested against paving in this district, and, consequently that the finding of the council to the contrary was untrue. *No objection was interposed to such evidence.* Based upon such evidence the court made a finding of fact that the owners of a majority of abutting front feet did protest against the levy of the assessment for paving in said district (Rec. 185), and found as a conclusion of law that neither the city nor its council ever obtained jurisdiction to make said improvements. (Rec. 188). The most that can be urged against the bill is that it is somewhat uncertain in failing to allege *in totidem verbis* that extrinsic evidence is necessary to establish the invalidity of the tax; and we do not even concede the bill is uncertain in that respect if it is construed as a whole. But if it is merely indefinite or uncertain, such indefiniteness and uncertainty are cured by the findings of the court (heretofore referred to) as a trier of the facts.

Lewis v. Bartsfield, 75, Ind., 390.

Garard v. Garard, 135 Ind., 15.

Glaspie v. Keator, 56 Fed. Rep., 203.

Shaw v. Waterbury, 46 Conn., 263.

Every reasonable intendment will be made in favor of the bill, even though implications

are resorted to, since what is necessarily understood or implied in a pleading forms a part of it as much as if it was expressed.

Batterson v. R. Co, 49 Mich., 184.

Kelley v. Rogers, 21 Minn., 147.

Lothr v. Murphy, 45 Mo. App. 519.

White v. Spencer, 14 N. Y., 247.

Hazelton v. Union Bank, 32 Wis., 34.

It must not be forgotten also that counsel for appellant in this case insist that jurisdiction appears upon the face of the record of the common council. They say in their brief:

> "It must be remembered that jurisdiction appears upon the face of this record and that the city council decided in a judicial way that it had jurisdiction." (p. 46).

But this is an appeal from a territorial court; and this court has determined that its authority, on an appeal from a territorial court is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence.

San Pedro, etc. Co. v. United States, 146 U. S., 120.

We respectfully submit that the allegations of the bill and supplemental bill, and the facts as found by the trial court and adopted as the facts by the territorial Supreme Court, by rendering a general judgment of affirmance, bring this case within the several acknowledged heads of equity jurisdiction which we have heretofore specifically enumerated. But to give a court of equity jurisdiction to enjoin the collection of this special assessment, it is only necessary that the case fall within some *one* acknowled head of equity jurisdiction. As said by Mr. Justice Field in the case of Dows v. Chicago, 11 Wall, 108:

> "It must appear that the enforcement of the tax would lead to a multiplicity of suits, *or* when the property is real estate, throw a cloud upon the title of the complainant before the aid of a court of equity can be invoked."

The findings of fact of the trial court, which are the admitted facts in this court, show that this action to enjoin the collection of the special assessment in question, is maintainable upon several distinct grounds, and that the appellees have no plain, speedy and adequate remedy at law.

II.

Certiorari is not the proper remedy.

It appears from the findings in this case that the record of the common council shows upon its face that the council had jurisdiction. The record makes a *prima facie* showing in favor of the legality of the tax. It was only by evidence *dehors* the record that the illegality of the tax was, or could have been established. It is not definitely urged by appellants counsel that *certiorari* would have been an available remedy, but their brief contains an intimation to that effect. It being admitted by them, however, that jurisdiction appears upon the face of the record (Brief 46), it necessarily follows that the complainants could not have obtained any relief by a writ of *certiorari*.

Ewing v. St. Louis, 5 Wall, 413.

III.

The appellees had no adequate remedy at law.

Appellant's sixth assignment of error is that the court erred in holding that the plaintiffs had no plain, complete and adequate remedy at law. (Brief 31). It is insisted that the statutory remedy given by section 1, *supra*, of the statute is an exclusive remedy and pre-

cludes a resort to a court of equity to enjoin the collection of the tax. That portion of said section upon which appellants rely, reads as follows:

> "And no such special tax shall be declared void, nor shall any such assessment or part thereof be set aside in consequence of any *error* or *irregularity* committed or appearing in any of the proceedings under this act or the acts of which it is amendatory, but any party feeling aggrieved by any such special tax or assessment or proceeding may pay the said special tax assessed upon his, her or its property, or such installments thereof as may be due at any time before the same shall become delinquent, under protest and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter and not later to recover so much of the special taxes paid as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment to be apportioned by the court, as may seem proper, which remedy shall be exclusive."

The contention that the remedy given by the section just quoted is an exclusive one and precludes relief in a court of equity is completely answered by the territorial Supreme Court in this case.

In support of the contention of consel for appellant that the foregoing statute furnishes to appellees an exclusive remedy and inhibits a resort to equity, they cite four cases from this court which we will briefly review.

The *R. R. Tax Cases, 92 U. S., 575*, were three cases wherin the Circuit Court of the northern district of Illinois had enjoined appellants from collecting taxes assessed by the proper officers of the *State of Illinois* against three several railroad companies In those cases the suggestion that there was an exclusive statutory remedy was not considered nor passed on. The court incidentally mentions the system prevailing in the customs and internal revenue departments of the general government, and refers to it as "a complete system of corrective practice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the exclusive departments."

The court then quotes this language from an act of congress enacted in 1867:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," and then states that it applies alone to taxes levied by the United States, and that it is only cited to show the sense of congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence. Furthermore, it appears that the state board of equalization of Illinois had jurisdiction in all those cases; and in holding that the collection of the *state* revenue would not be enjoined, the court said there was reason and authority for relaxing the rigid rule in cases of taxes levied by counties, towns and cities.

In *Shelton v. Platt, 139 U. S. 591*, cited by appellant, while it is true that the court held that the remedy provided for by the statute of Tennessee to recover back an illegal tax after payment, was an exclusive one, still the court very emphatically intimates that if any irreparable injury to complainants had been shown, equitable interposition to restrain the collection of the tax would have been proper. And the question of the jurisdiction of the paving authorities was not raised nor discussed. It affirmatively appeared also that there were no equities in the bill.

The case of *Snyder v. Marks, 109 U. S., 189,* also cited by appellant, is not in point. The sole object of the action was to restrain the collection of a tax which purported to be levied under the internal revenue laws. The court refused the injunction on the sole ground that the act of congress of July 13, 1866, as amended by the act of March 2, 1867, absolutely prohibited the maintenance of a suit in any court to restrain the assessment or collection of any tax levied under the internal revenue laws.

In the last case, cited by appellant, of *Dows v. Chicago, 11 Wall, 108*, this court held that a decree of the Circuit Court for the northern district of Illinois dismissing a bill filed to restrain the collection of a tax, was proper, upon the sole and only ground that it did not appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or throw a cloud upon title, or produce any other result which equity would intervene to prevent. The question of the exclusiveness of a statutory remedy was not discussed nor passed on.

But let us explain that portion of section 1 of the statute, quoted in appellant's brief (p. 38-39), and upon which appellants counsel rely in asserting that the remedy provided for

therein is exclusive of other remedies. This language occurs at the outset:

> "And no such special tax shall be declared void, nor shall any such assessment or part thereof be set aside in consequence of *any error or irregularity* committed or appearing in any of the proceedings under this act or the acts of which it is amendatory; but any party feeling aggrieved by any *such* special tax or assessment may pay under protest with a notice in writing that he intends to sue to recover the same."

The statute then states that this remedy shall be exclusive.

Let it be remembered at the threshold of this discussion on this topic, that appellees (plaintiffs below) are not seeking to have this assessment set aside for any *error* or *irregularity*. It is attacked because the council *never acquired jurisdiction to levy it;* and, as said by the territorial Supreme Court in this case in discussing this question:

> "But this statute did not contemplate a case where the whole initiatory proceedings were absolutely void, and where no jurisdiction had ever been acquired to commence the improvements or levy the tax. * * * If, after having acquired jurisdiction the city council should have *errone-*

> *ously* levied a larger tax than was necessary * * * or * * * * should *irregularly* have assessed more property against a person than he owned, then, of course, the party injured would be compelled to remedy such *error* or *irregularity* by giving a proper notice and commencing action as in this section of the statute provided. But it cannot be maintained that when the tax was *wholly void and illegal*, as in this case, the parties injured were compelled to use this special and summary remedy, when the whole field of equitable relief was open to them." (Rec. 200).

On the question as to whether a statutory remedy is an exclusive one, Cooley in his work on taxation says:

> "For merely *irregular* assessment, the statutory remedy is also the exclusive remedy. It is supposed to be adequate to all the requirements of justice, and it is the party's own folly if he fails to avail himself of it." (Page 751.)

The word italicized is so emphasized by the author himself, manifestly to distinguish such an assessment from one made by a board or tribunal having no jurisdiction. It is equivalent to a statement that an absolutely void assessment, made without any jurisdiction in the tribunal making it, as in the case

at bar, will be set aside by a court of equity and its collection enjoined.

The case of *Chambers v. Satterlee, 40 Cal. 497*, was an action to recover an assessment for alleged improvements on a street in San Francisco. The court held that the remedy of the aggrieved party was by appeal to the board of supervisors, as provided by statute, and that no mere *irregularity* could be set up as a defense to an action to recover the amount of the assessment. But the court said, as tersely expressed in the syllabus:

> "It was the intention of the statute * * * * *to leave open for judicial inquiry all questions of a jurisdictional character*, and to submit all other questions to the decision of the board of supervisors."

In the analogous cause of *Emery v. Bradford, 29 Cal., 75*, the Supreme Court of California held that the remedy of an owner of a lot in San Francisco assessed for work on a street in front of the same, if dissatisfied with the decision of the superintendent of public streets, is an appeal from such decision to the board of supervisors. But in discussing the statute, requiring an appeal to the board of supervisors, the court said:

> "If the proceedings are regular, so that *the proper officers have jurisdic-*

> *tion to act,* * * * * their determinations are valid and can only be reviewed in the mode appointed by law." (p. 85).

The statute providing for an appeal to the board of supervisors expressly stated that their decision should be final and conclusive. But the court held that their decision was final and conclusive only in correcting *errors* and *irregularities*; and that on jurisdictional questions such decision was not final and conclusive. The court further said, at page 86:

> "*There are acts to be performed of a jurisdictional character essential to the validity of the assessment.* It is not to be supposed that the conclusiveness of the decision of the board of supervisors is to extend to that class of acts."

In the case of *Wright v. the City of Boston, 9 Cush., 233*, the Supreme Judicial Court of Massachussetts, in holding that an objection to a tax for some *defect* or *irregularity* in making the assessment must be taken advantage of by appeal, said:

> "For any defect or irregularity in the course of proceeding in making the assessment, any ground of objection, *which does not go to show the whole proceeding a nullity*, he must take his appeal, if he has one."

The various states have a variety of statutory provisions prescribing the procedure to be resorted to by an aggrieved tax-payer to secure a correction of his assessment for overvaluation, or for errors and irregularities committed by the taxing authorities. Appeals to boards of equalization, or to boards of review, petitions for abatement, payments under protest and suits to recover back, as in the Utah statute above quoted, are some of the methods prescribed in order to obtain relief from errors, irregularities, overvaluation or other wrongs complained of by aggrieved tax-payers. And it is usually held by the courts that the aggrieved party must pursue the statutory remedy to secure relief from errors and irregularities, such as overvaluation and analogous mistakes, which do not affect the jurisdiction of the board or tribunal levying the tax. But when it appears that the board or tribunal levying the tax had absolutlely no jurisdiction, as in this case, then a complaining tax-payer may ignore the statutory remedy provided for correcting mere errors, and resort to a court of equity for relief. If there is no jurisdiction, the entire proceedings are void, and equity will afford relief by injunction if the facts are such as to bring the case within a recognized head of equity jurisdiction. In other words,

in such cases as the one at bar, where the council had no jurisdiction, the statutory remedy need not be pursued.

Board v. Cattle Co. 31 Pac., (Wyo.), 268.

Topeka etc. Co. v. Roberts, 25 Pac., (Kan)., 854.

Consumers' Ice Co. v. State, 33 Atl., (Md)., 427.

Yocum v. Bank, 43 N. E., (Ind)., 231.

Union Pac. Ry. Co. v. Cheyenne, 113 U. S., 516.

Stanley v. Board of Supervisors, 121 U. S., 535.

The case of *Stanley v. Board of Supervisors, supra*, is an instructive case in this connection. It was an action to recover from the board of supervisors of Albany county, New York, certain amounts paid as taxes on shares of national bank stock. The court held that the assessing officers, in making the assessment were acting *within their authority*, and that, *for that reason* the duty devolved upon the stockholders to take such steps as were required by law to obtain a correction of the over assessment. But the court, speaking through Mr. Justice Field, said:

> "*It is only when the assessment is wholly valid*, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or when the assessment has been set aside as invalid that an action at law will lie for the taxes paid, or for a portion thereof. * * * In nearly all the states, probably in all of them, provision is made by law for the correction of *errors* and *irregularities* of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization as they are often termed, with sometimes a right of appeal from their decision to the courts of law. *They are established to carry into effect the general rule of equality and uniformity of taxation* required by constitutional or statutory provisions. * * * To these boards of revision, by whatever name they are called, the citizen must apply for relief against *excessive* and *irregular* taxation, *where the assessing officers had jurisdiction to assess the property.* * * * * Their action being judicial, their judgments *in cases within their jurisdiction* are not open to collateral attack."

The court then expressly holds that where even overvaluation has arisen from the adoption of a rule of appraisment which conflicts with a constitutional or statutory direction

and operates unequally on a large class of individuals or corporations, a party aggrieved may resort to a court of equity.

IV.

The court did not err in failing to find on the issues raised by appellant's answer of (1) estoppel and (2) statute of limitations.

(1) ESTOPPEL.

The fifth assignment of error (Apps. brief. 30) is to the effect that the court erred in failing to find on the issue of estoppel raised by the defendants' amended answer to the supplemental bill.

In discussing this assignment counsel for appellant make the statement (brief 52) that all the plaintiffs in the supplemental complaint are estopped because they stood by, well knowing that the city council had levied the assessment complained of, and that the city was making the improvement, and did not bring any action to restrain the city or its council from doing the work until the work was completed and the contractors paid for doing the same in full. To this statement we enter a most emphatic denial. There is not a syllable of testimony in the record even tending to show such a state of facts. There is no

testimony showing or tending to show that any of the appellees knew the improvement was being made or that the improvement was being made at all; and there is not a *scintilla* of evidence in the record that the work ever was completed or that the contractors were paid a single dollar for doing the work. No evidence whatever was introduced in support of this plea of estoppel. When no evidence, or insufficient evidence, is introduced in relation to an issue, findings of fact are unnecessary.

Rogers v. Duff, 97 Cal., 66.
Sterling v Smith, 97 Cal., 343.
Golden v. Newbrand, 52 Iowa, 59.
Thompson v. Myrick 24 Minn., 4.

The facts alleged constituting the plea of estoppel was, under the Utah code, new matter and deemed controverted by the plaintiffs.

2 Com. Laws, Utah Sec. 3248.

Being new matter it constituted an affirmative defense and the burden of proof was upon the defendants to establish it.

Under such circumstances, there being absolutely no evidence in the record tending to sustain the plea, a finding of fact thereon must necessarily have been adverse to the appellant. Therefore the findings already found

being sufficient to support the judgment, there is no error.

Groome v. Ogden city, 10 Utah, 54.

Knowles v. Seale, 64 Cal., 377.

Then again the facts found by the court expressly negative any estoppel. If the facts found by the court are true, there could be no estoppel. In this connection it must be borne in mind that there was no plea of estoppel in the answer to the original bill. The original bill was filed May 21st, 1892, (Rec. 7); and the findings show that the first move in the direction of paving by appellant was taken on March 7th, 1892, and that bids were to be received by the city until *May 23rd, 1892*, for paving this district. (Rec. 186). How can counsel consistently say in their brief (52) that plaintiffs did not bring their action to restrain the council from doing the work until the work was completed, when the findings show that the bill was filed two days before the final day for receiving bids? (Rec. 186). Then again, the ordinance levying the special assessment was passed March 22nd, 1893,—nearly one year after the filing of the original bill. (Finding 12, Rec. 187). These affirmative findings unquestionably completely negative the facts alleged by way of estoppel in the

defendant's answer to the supplemental bill. Such being the result, it was not error to fail to make an express finding on the plea of estoppel.

Haarstick v. Fox, 9 Utah, 110, 123.

Maxfield v. West, 6 Utah, 327, 379.

Fox v. Haarstick, 156 U. S., 673.

Then, this being an equitable action, if the decree is supported by the evidence it makes no difference whether it is supported by the findings or not.

Maxfield v. West, 6 Utah, 327.

S. C., 6 Utah, 379.

This court has decided that a failure of the lower court to find other facts than those affirmatively found, is not open to revision here.

Stanley v. Board of Supervisors, 121 U. S., 535.

The findings affirmatively made by the court, it will be readily conceded, support the judgment entered by the court. The decree is in strict conformity to the findings of fact and conclusions of law. It also appears that appellant did not make a request for any findings other than those made by the court. No findings were tendered by the appellant with a

request that they be signed, and no objection was made in the trial court to a mere omission to make findings on certain issues. It is a well understood rule that if a party desires any particular finding of fact, he must call the attention of the court to the matter of fact upon which he desires a finding.

Lucas v. San Francisco, 28 Cal., 591.
In re Arguella's estate, 85 Cal., 151.
Thompson v. Bank, 82 N. Y., 1.
Irrigation Co. v. Barnhart, 22 Ore., 389.
Barry v. Schmidt, 57 Wis., 176.

Not only must a party make a request for specific findings upon particular questions of fact, but if the court refuses his request, he must save an exception to such refusal. There being no exception in the record in this case to a refusal of the court to make findings on any particular matters of fact, such questions are therefore not a proper subject of review by the court.

Lucas v. San Francisco, *supra*.
Cook v. De La Guerra, 24 Cal., 237.
Irrigation Co. v. Barnhart, *supra*.
Thompson v. Bank, *supra*.
Coombs v. Ry. Co., 11 Utah, 137.

The trial court also finds as a fact, and decides as a conclusion of law, that the common council had no jurisdiction to make the assessment, and that therefore, the assessment provided for in the ordinance of March 22nd, 1893, was and is absolutely void. (Rec. 188). It is a familiar rule that judgments made by a tribunal having no jurisdiction over the subject matter, are void, and that no estoppel can arise from proceedings which are absolutely void. In the foregoing discussion we have demonstrated that the whole proceedings in levying the special assessment in question, and in attempting to collect the same, are absolutely void, as having been taken by a body having no jurisdiction. Under such circumstances there could be no estoppel, and the trial court for that reason alone, did not commit any error in failing to find on that so-called issue.

Freeman Judg., Sec. 264.

Mercier v. Chase, 9 Allen, 242.

Howell vs. City of Tacoma, 3 Wash., 711.

S. C. 29 Pac. Rep., 447.

Dean v. Charlton, 23 Wis., 590.

(2) STATUTE OF LIMITATIONS.

The statute of limitations pleaded by appellant, is set up in the answer to the supplemental bill, and is that portion of section 1 of the statute printed as an appendix to appellant's brief (p. 67-8) which requires that an action brought to recover taxes back which are paid under protest, must be brought within sixty days after the payment thereof under protest. At the outset it will be seen that the statute so pleaded could only apply, in any event, to that portion of the supplemental bill which alleges the payment of certain amounts by certain of appellees under protest, and prays for the recovery thereof, and to that portion of the judgment requiring the repayment thereof. So far as the original bill is concerned, and the purely equitable relief prayed for therein, the statute has no possible application, and in fact is not pleaded as a defense thereto. But the statute has no application to the cause of action for money paid under protest. The statute, as heretofore shown, applies to cases where there are only errors, irregularities, overvaluations, or other defects which are not jurisdictional. The council, not having jurisdiction to levy the tax, could not proceed under the statute, and therefore the tax-payers, need not proceed un-

der the statute to recover the amounts paid. In fact the amounts paid under protest were not *taxes* in any sense of the term. The whole proceedings being void, the amounts paid were simply enforced unlawful contributions to the city treasury, and could be recovered back in an action for money had and received. Our former contention being correct, that the statutory remedy by paying under protest and suit to recover back, is not an exclusive remedy because the council had no jurisdiction, it necessarily follows that the period of limitation provided for in the same statute has no application.

But the findings of fact constitute the admitted facts in this case, and *they fail to show when the money was paid under protest.* Assuming the statute to be applicable, the period of limitation would certainly commence to run from the time of payment under protest. This time the findings fail to fix. The fourteenth finding of fact is that appellants, in pursuance of the ordinance of March 22nd, 1893, were about to expose appellees' real estate for sale to satisfy the illegal assessment; and that, after their property had been advertised for sale, they paid the amounts fixed in the findings under protest. (Rec. 187). For aught that appears from the findings, these amounts

may have been paid the day before the supplemental bill was filed.

In the next place the statute limits itself to a *case where a person pays before the tax becomes delinquent.* It contemplates a case where the assessment as a whole is legal and where there are special objections by an individual to certain portions due from him, such as overvaluation, or that the method of assessing was not uniform. In this case the appellees *paid after the tax became delinquent.* Can it be said that the appellees are absolutely without remedy when the appellant has extorted their money from them, by absolutely void proceedings and against their protest? The city has no right to retain this money. It belongs *ex æquo et bono* to appellees, and the law does give them a remedy.

Keener Quasi Cont. pp. 421-5.

And we reiterate what we said respecting the so-called defense of estoppel pleaded by appellant. The court finds that the amounts named in the findings, were paid under protest and that appellees are entitled to recover from appellant the respective amounts so paid. (Rec. 187-8). Such a finding necessarily negatives the defense of the statute of limitations to the supplemental bill. And no finding was

tendered by appellant on this subject and no exception entered to a refusal to give it. But, again we say that the statute limiting the time to sixty days within which to bring an action to recover taxes paid under protest, is applicable only to such cases where the common council obtains jurisdiction.

Wahlgreen v. Kansas City, 21 Pac., 1068.

Good v. Norby, 28 Iowa, 188.

In the case of *Wahlgreen v. Kansas City*, *supra*, the court said:

> "*When jurisdiction is once obtained, irregularities* can only be corrected in the manner *and within the time prescribed by statute.*"

This is certainly equivalent to a declaration that when jurisdiction is *not* obtained the statute has no application; and, if the statutory period of limitation has no application to the case, then a finding on that question would be immaterial, for the defense itself is rendered immaterial by the decision that the whole proceedings are void. It is not error for the court to fail to make express findings on an issue raised in the pleadings which has become immaterial during the course of the trial.

Chambers v. Emery, 13 Utah, 374.

Porter v. Woodward, 57 Cal., 535.

Groome v. Ogden city, 10 Utah, 54.

Witcher v. Conklin, 84 Cal., 499.

Drainage Dist. v. Crow, 20 Oregon, 537.

Knoch v. Van Bernuth, 145 N. Y., 643.

V.

Do the findings support the judgment?

On pages 36-38 of appellant's brief, appellant's counsel discuss the question as to whether or not the findings of the trial court support the judgment; and appellant's second assignment or error asserts that the facts found do not entitle the plaintiffs to a decree for any relief whatever. (Brief 29). Appellant's sole and only complaint is directed to that portion of finding No. 6 (Rec. 185) which affirms that the abutting property owners who protested against the assessment for paving, owned, and protested for, more than one-half of the whole frontage on said Twenty-fifth street within said paving district. Counsel for appellant declare (brief 38) that this is a finding that, upon the face of the record, the council had no jurisdiction; and that therefore appellees had

a plain, speedy and adequate remedy at law. Such is not the case. The court found as a fact that the owners of a majority of abutting front feet actually protested; not that the record shows on its face that they actually protested. On the contrary, the record of the council shows on its face that the owners of a majority of abutting front feet *did not* protest. A special committee of the common council compared the protests filed *with the record showing ownership* and made a report to the council that a majority of frontage *had not* protested. (Rec. 143). And the trial court finds that the council, in spite of the protests, on March 22, 1893, passed the ordinance levying the assessment, which ordinance is made exhibit "A" to the findings (Rec. 187, 189, 192). And in said ordinance is an express finding made by the council that a sufficient majority *had not* protested. The mere filing of a protest *purporting* to be signed by the owners of a majority of front feet is not conclusive. Suppose an abutting owner should sign a protest against paving and represent therein that he owned 100 front feet in the paving district, whereas, in truth and in fact, he owned only twenty-five front feet. Would his assertion that he owned 100 feet be conclusive? Not at all. If such were the case, a person owning no property in the

district could protest against paying and assert his ownership of the entire district, and thereby defeat a municipal improvement, when all of the actual property owners in the district were in favor of the improvement. The question of ownership is a question of fact, independent of the showing made by the protestors in their written protest, and the trial court found that issue of fact directly contrary to the finding made by the common council. The finding of the court is conclusive here.

Council for appellant discuss the question of the sufficiency of the protest signed by the property owners, *as disclosed by the evidence*. The trial court finds the protest to have been sufficient, and this court has repeatedly decided in the cases of *Stringfellow v. Cain* and other cases cited *supra* that it has no authority to pass upon the weight of the evidence to support the findings. In this connection we call attention to the fact that both the seventh (brief 31) and ninth (brief 32) assignments of error present purely questions of the weight of the evidence and its sufficiency to sustain the findings, and therefore, within the rule just announced, will not be considered by this court.

VII.

The payments made by appellees were not voluntary.

It is urged by appellant (brief, 29, 30, 59, 60), that the Supreme Court of the territory erred in affirming the judgment of the trial court wherein the latter court awarded the respective appellees individually judgment for the amount of taxes paid for two reasons:

1. That the appelles had a complete remedy at law under the provisions of the statute heretofore discussed.

2. That the payments were voluntarily made and therefore could not be recovered.

The first objection, that the appellees had a complete remedy at law, has already been fully discussed, and will not be further considered. The second objection, that the payments were voluntarily made, is not tenable. The trial court found that the appellant was about to expose the real estate described in the original and supplemental bills for sale to satisfy the illegal assessment imposed by the ordinance of March 22nd, 1893, and that appellees, after their property had been advertised for sale and was about to be sold to satisfy the said illegal assessment, paid under

protest to appellant the amounts named in the finding. (Finding 14, Rec. 187).

Payments made under such circumstances are not voluntary because:

1. The authority to levy the tax was wholly wanting, and the assessment absolutely void.

2. The money was paid to appellant for its own use.

3. The payments were made by appellees under compulsion or duress, to prevent the sale of their property and to prevent an apparently valid cloud on the title thereof.

4. The assessment has been set aside by the court.

5. The payments were made under protest.

2 Dillon Mun. Corp. (4th Ed.), 940, et esq.

Grand Rapids v. Blakely, 40 Mich.,367.

2 Dillon Mun. Corp. (4th Ed.), 942.

Cooley Taxation (2n Ed.), 811.

Keener Quasi-Cont., 424-5.

State Tonnage Tax Cases, 12 Wall, 204.

Erskine v. Van Arsdale, 15 Wall, 75.

Phila. v. Diehl Collector, 5 Wall, 731.

Mayor etc. v. Riker, 9 Vroom, 225.

The amounts paid under protest as dis-

closed by the findings, are recoverable in this action because when equity has acquired jurisdiction of a controversy for one purpose, it will retain jurisdiction and settle it for all purposes.

Ober v. Gallagher, 93 U. S., 199.

Pom. Eq. Jur., Sec. 231, 234, 236, 239.

It is also said in appellant's brief (p. 59 that the court erred in not finding upon the issue of voluntary payment. This objection is not available because:

1. The court did expressly find that the payments were not voluntarily made.

2. No such error is assigned in appellant's brief.

VIII.

The judgment of the Supreme Court of Utah territory should be affirmed.

E. M. ALLISON, JR.,
Solicitor for Appellees.

DATED OCTOBER, 1897.